1961

William D. Johnson v. Robert Crail, Henry M. Scheurn and Daniel S. Bushnell : Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

WILLIAM D. JOHNSON,

Plaintiff and Appellant,

vs.

ROBERT CRAIL, HENRY M. SCHEURN and DANIEL S. BUSHNELL,

Defendants and Respondents.

No. 9291

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The Respondents entered into a Stipulation concerning the Statement of Facts and issues raised which was intended to be in lieu of any other statement of the case. For this reason, it is felt that it was unnecessary for the Appellant to review the pleadings and allegations in connection with the First Cause of Action. Also, certain statements contained in the Appellant's Statement of the Case have not been determined; more particularly, on page 2 it states that the stock of Pru-

dential was in fact worthless, which has not been determined. However, since the stipulated statement of facts is also set out in the Appellant's Brief, it is deemed unnecessary to further discuss these issues.

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POINT I

THE STOCK ISSUED BY PRUDENTIAL OIL & MINERALS COMPANY WAS NOT IN VIOLATION OF THE SECURITIES LAWS OF THE STATE OF UTAH.

Since the Appeal raises the single question of whether the issuance of the stock was an isolated transaction exempt by virtue of the Securities Law, it is felt that the Statute involved should be specifically indicated.

Section 61-1-6, Utah Code Annotated, 1953, in part provides as follows:

> "SALES EXEMPTED FROM CHARTER.—Except as hereinafter expressly provided, the provisions of this chapter shall not apply to the sale of any security in any of the following cases:
>
> "(3) An isolated transaction in which any security is sold, offered for sale, subscription or delivery by the owner thereof, or by his representative for the owner's account; such sale or offer for sale, subscription or delivery not being made in the course of repeated and successive transactions of a like character by such owner or on his account by such representative, and such owner or representative not being the underwriter of such security. The provisions of this subdivision shall

not apply in any case of sale where the issuer shall have taken the entire stock of a company in payment for mining claims, patent rights, copyrights, trademarks, process, lease, formula, oil lease, good will or any other property right or any other tangible or intangible asset which may be construed as a promotion interest, or where funds receivable from the sale of such security may be used directly or indirectly for development purposes."

A. Case Authority:

There have been a few cases construing this provision; however, again it becomes a matter of statutory construction of the particular statute involved. An early annotation contained in 87 ALR 42, involving Blue Sky Laws has not been supplemented or superseded concerning the issues involved in this discussion. There appears to be no Utah case which discusses this provision involving the issues herein raised. Most of the cases from other jurisdictions involved a discussion of this provision as to the question of whether the statute was constitutional and most courts held that it was. However, in the case of People v. Pace, 73 Cal. App. 548, 238 Pac. 1089, the law was held unconstitutional as being a restriction upon the rights of ownership. In Brannan, Beckham & Co. v. Ramsaur, Georgia 1930, 152 S.E. 282, 287, the court apparently had this issue presented to it but felt that a determination was not necessary in making its decision of that case. In so doing the court stated as follows:

"In these circumstances the sale could not be exempted under Section 9(1), irrespective of whether it was an isolated transaction as to the owner. In this view, it is unnecessary to determine whether an owner

who is also the issuer could claim the exemption provided by Section 9(1).

> "What we hold is that, whether an owner be the issuer or not, a sale made in his behalf by a regular broker or dealer is not an isolated transaction, since it was necessarily made in the course of repeated and successive transactions of a similar nature by such representative of the owner."

In the early case of Smith v. Crawford, Kan. 1929, 15 S.W. 2d., 249, the court does make a distinction as between the corporation and the stockholder owner. However, it appears that there are peculiarities in the Kentucky law which makes this case distinguishable. In checking II Ken. Rev. St. Sec. 292.030, Exempt Transactions, the isolated transaction section is the same but there does not appear to be an individual owner exemption. Although Notes and Annotations to Ken. Rev. St. 1944 Chapter 292 traces the legislation history of the section it doesn't show the exact status of the law as it was in 1929 when the case was divided.

Although the case cited in one of the opinions of the Utah Attorney General may be distinguished because of the statute involved the court in Ersted vs. Hobart Howry Company, 299 N.W. 66, 68, stated as follows:

> "It is immaterial whether the corporation or the defendant Wilson was the owner of the shares of stock acquired by the plaintiff or whether he was acting for himself or the corporation. Under the evidence, the sale of stock to the plaintiff was an isolated sale, not made in the course of repeated and successive sales of a similar nature and the prohibition of the statute did not apply to the transaction."

The Utah cases cited by the Appellant, more particularly those shown on Pages 10 and 11 of its brief; namely, Buttrey vs. Guaranteed Securities Company, (1931) 78 Utah 39; 300 Pac. 1040; Hansen vs. Abraham Irrigation Company, 25 Pac. 2nd 76; and Harper vs. Tri-State Motors, 58 Pac. 2nd 18, are not factually in point, nor do they raise or discuss the issue of law here presented. Therefore, since there are no cases issued by the Utah Supreme Court construing these provisions the issue becomes one of first impression and becomes primarily a matter of statutory construction, taking into consideration the construction placed thereon by opinions of the Utah Attorney General and the practical accepted construction placed thereon by the members of the Bar of the State of Utah.

B. Statutory Construction.

It is the position of the Appellant that a corporation is not the owner of authorized unissued stock and, therefore, this exemption is not available to a corporation, but rather is available to the stockholders who own the stock. Although certain terms are defined by the statute, the word "owner" is not so defined. In Section 61-1-4 the word "person" shall include a natural person, a corporation created under the laws of this state * * * * , a partnership, an association, a joint stock company, a trust, and any unincorporated organization.

In the late 1920's there was considerable activity involving the promotion, sale, and distribution of stocks leading up to the crash which occurred in 1929. Other states enacted laws which were similar to the Securities Law in the State of Utah. More particularly, such a law was enacted in the following states: Arizona, Arkansas, Georgia, Illinois, Kansas, Michigan, Kentucky, Minnesota, Missouri, New Mexico, Ohio, Penn-

sylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, West Virginia, and Wyoming. However, in checking the statutes in some of these states, there are various changes in connection with the isolated transaction provision. The last clause of the first sentence of the Utah Law limits the exemption by stating:

> "And such owner or representative not being the underwriter of such a security."

In some states this restriction is broader in that it restricts the exemption by providing that it shall not apply to "the issuer or underwriter of such a security." Since the word issuer, which would clearly apply to the corporation, was specifically eliminated it is only logical that the legislature intended not to so limit the exemption as not applying to the corporation. Further, it may be argued if the word issuer was included in the restriction on the exemption, the definition of the word issuer as contained in sub-paragraph 5 of Section 61-1-4, Utah Code Annotated, is broad enough to include any private person who is the owner of the securities received from the corporation and, therefore, such an interpretation would also prohibit this exemption from being available to certain private persons and would in effect render the exemption of no effect.

There is an additional restriction on the use of the exemption which further makes it clear that the legislature intended that this exemption would normally be available to the corporation. After setting out the exemption, the Section provides further as follows:

> "The provisions of this subdivision shall not apply in any case of sale where the issuer shall have taken the entire stock of a company in payment for mining

claims, patent rights, copyrights, trademarks, process, lease, formula, oil lease, good will or any other property right or any other tangible or intangible asset which may be construed as a promotion interest, or where funds received from the sale of such security may be used directly or indirectly for development purposes."

It is clear from the foregoing part of the law that the legislature felt it was necessary in certain circumstances to restrict this exemption so far as the issuer, or corporation, was concerned. If the Section was not intended to apply to the Company since it was not the owner of its securities, then there would be no need for this additional restriction.

Looking further at the law as a whole, it will appear that the strained construction maintained by the Appellant would be inconsistent with such law. The Appellant maintains that this exemption is only for the individual stockholder rather than the company. However, if this contention is valid, the exemption contained in subparagraph (9) of the same section is not necessary. Part of that sub-paragraph (9) is as follows:

"(9) The sale, assignment, transfer or exchange by a natural person of any security issued and delivered by a corporation which at the time of such issue is lawfully qualified to do business in this state and at the time of such sale, assignment, transfer or exchange is in actual bona fide existence and actually engaged in the transaction of the principal business provided for by its Articles of Incorporation, if such natural person is a resident citizen of this state and the bona fide owner of such security * * * ."

It is clear that the foregoing is intended to cover the individual stockholder. It would be unnecessary to have this provision if the isolated sale exemption as contained in sub-

paragraph 3 were to apply to the individual stockholder as now contended by the Appellant. Since the Legislature did include the individual stockholder exemption contained in sub-paragraph 9, it is the normal statutory construction to conclude that some different exemption must have been intended by "isolated transaction" provisions of sub-paragraph 3.

In considering the purpose for the enactment of such laws, as will be more thoroughly discussed under Attorney General opinions, it is evident that the law was intended to protect the public generally, and that no such protection was intended or felt necessary in the situation of the company issuing stock not involving public offerings.

The case law in the State of Utah does take the position that the Securities Law will be strictly construed. Guarantee Mortgage Co. vs. Wilcox, 62 Utah 184, 218 Pac. 133; Miller v. Stewart, 69 Utah 250, 253 Pac. 900; Willis vs. Spring Canyon Coal Co., 4 Utah 2d, 211.

The isolated sale exemption was not restricted by the Legislature as against the issuer which would include the company as was done by other states in enacting comparable laws; the individual stockholder trading his stock is exempt by sub-paragraph 9 of the same section of the law, and it is, therefore, unnecessary to contend that the isolated sale exemption was intended to only apply to such individual stockholder; the isolated sale exemption specifically restricts the use of the exemption by the issuer in certain circumstances, thus indicating that the exemption is available in the normal circumstances, which would be the facts of this case; the law was intended to protect the public from public sales of stock;

and since the cases of the State of Utah have indicated that the law shall be strictly construed, it is therefore submitted that on the issue of statutory construction alone the holding of the Trial Court to the effect that this exemption was available to Prudential Oil & Minerals Company under the facts of this case should be affirmed.

C. *Utah Attorney General Opinions*

The Securities Commissioners in the past have requested opinions concerning the availability of this exemption from the Utah Attorney General's Office. One of such opinions was issued on May 15, 1942, and is set forth in the appendix to this Brief. The distinction which the Appellant is attempting to assert on this appeal was not made by the Attorney General in that opinion. In fact, after a fairly lengthy discussion the Utah Attorney General quoted in part as follows:

> "In the opinion of the General Counsel of the Securities & Exchange Commission, released January 4, 1935, it was held that if the size of the offering, or the number of units offered is so small that there is very little chance of repeated and successive transactions, and there would be a little probability of a distribution of the securities to the public generally and such an offering may only terminate in an isolated transaction. In considering the manner of offering the security, if the *issuer* enters into a few transactions with particular persons, the few transactions may be placed in the realm of isolated transactions more definitely than in the situation where the *issuer* engages a dealer or other machinery for the sale and distribution of the securities rather than by direct negotiation." (Emphasis added.)

The Utah Attorney General therefore makes the analogy that the isolated transaction provision is comparable to the

exemption in the U. S. Securities and Exchange Act of 1933, which exempts issues not involving a public offering. When the Attorney General talks about issuings and distributions, they are talking about stock being sold by the company and, therefore, they are taking the position that for this exemption the company is the owner of authorized unissued stock of the company. When one considers the purpose and intent of the legislation, it is clear that such a construction is the only valid one.

In December, 1946, the Attorney General issued another opinion specifically discussing the issue of whether the issuance by the Pacific States Cast Iron Pipe Company of 5% debentures would be exempt under this provision. The precise issue was there raised as to whether the corporation could be an owner of securities issued by it and could claim the isolated sale exemption of sub-paragraph 3. It cannot be contended any more in this case than in the factual situation discussed by the Attorney General that the corporation is not the type of owner intended to be exempt under the provision. A 5% debenture is not any more owned by the corporation than the authorized unissued stock of the company. Yet, the Attorney General held in that opinion that the exemption was available to the company. A copy of that opinion is also set out in the appendix. An excerpt from that opinion is as follows:

> "This act was obviously made for the purpose of protecting the public against the public offering for sale of securities which do not offer a sound investment. The isolated transactions exception was included because the Legislature evidently felt *that where an offer was to be made only to a few individuals and not to the*

general public, such individuals would probably be in a better position than would the state to determine the backing of the particular security involved." (Emphasis added.)

The part of the quotation from the opinion italicized referring to an offer being made under the circumstances can only be intended to mean an offer being made by the company. A debenture is a security. Stock of a company is a security. The debenture does not become valid until it has been delivered. Yet, in this case, the company has been held to be the owner of that debenture. Likewise, the company is the owner of its unauthorized unissued stock.

A reading of these opinions, as well as others issued by the Utah Attorney General's Office, will indicate that the narrow construction now contended by the Appellant has not been adopted by that office, and should not be adopted by this court.

D. *Practical Accepted Interpretation.*

The Trial Court ruled that the isolated sale exemption was applicable to Prudential Oil & Minerals Company under the facts of this case. Judge Stewart M. Hanson was an active member of the Utah Securities Commission during the so-called uranium boom when there was considerable activity involving that department. Consequently, it can be assumed that he became rather familiar with the law and the interpretation being placed thereon. Certainly his experience in that field, as well as being a practicing attorney, and now a District Judge should be given considerable weight by this court. It is submitted that most of the practicing attorneys in the State of Utah have relied upon the Attorney General's opinions

and have permitted, advised, and counseled corporations to issue stock in isolated transactions without securing prior approval from the Utah Securities Commission. In the case of Bateman vs. Board of Examiners, 7 Ut. 2d 221, 234; 332 P.2d 381, 390, the Utah Supreme Court stated:

> "Were we interpreting the statutes and constitutional provisions relating to the Board of Examiners for the first time we might be more impressed by arguments proposed by Education. However, history and experience have always been the very bone and sinew of the law. As stated by the great Justice Holmes: 'The life of the law has not been logic; it has been experience.' "

The narrow construction contended for by the Appellants would seem to require that even the stock issued by the company after its immediate incorporation to its incorporators and initial subscribers would not be exempt and, therefore, would require Securities Commission approval. Such an interpretation would seriously impede the business pursuits of the State of Utah and complicate the corporate practice, both for attorneys and the public generally. Such was not the intent of the Legislature in enacting such a law, but rather as cited and indicated by the Attorney General, it was intended to protect the public where public sales and offering of stock were contemplated.

POINT II

THE APPELLANT IS BOUND BY ITS STIPULATION THAT THE ISSUANCE OF THE STOCK WAS "AN ISOLATED TRANSACTION" AND MAY NOT NOW RAISE THAT ISSUE ON APPEAL.

The Appellant now seeks for the first time on appeal to raise the issue of whether the issuance of Prudential Oil & Minerals Company was "an isolated transaction." At the time of the Pre-Trial on September 29, 1959, (R. 9), Mr. Child stipulated as follows:

> "In explanation of the plaintiff's complaint herein the plaintiff does not claim that these defendants participated in the issuance or offering of any other stock in this corporation; to-wit, the Prudential Oil and Mineral Company, other than the issuance of the stock to Fred B. Grube and W. D. Johnson, the plaintiff herein, and that this was a single transaction in stock for these 18 mining claims."

There were two additional Pre-Trial Orders issued after this date, one on March 29, 1960 (R. 21-24) and April 26, 1960, (R. 25-26). This stipulation was not subsequently changed. The issue was submitted on written briefs to the Trial Court based upon this stipulation of facts by counsel for the Appellant. Counsel should not now, therefore, be permitted to raise, or challenge this issue for the first time on appeal. The stock issued to Fred B. Grube, as well as to W. D. Johnson, was all handled in connection with the same transaction; more particularly, a conveyance was received from one of the Grube associates clearing title to the property, and stock was issued for equipment used and then on the property, as well as the 18 mining claims. An Attorney General's opinion has ruled that even though the stock may be issued to more than one person, this would not render the issuance other than an isolated transaction if it arose out of the same negotiation involving the same parties. Factually it was an isolated sale and ethically counsel for the Appellant should not now attempt to change

the issues upon which it stipulated at the time of Pre-Trial and which is contained in the stipulated statement of facts now presented to this court.

POINT III

THE ISSUANCE OF THE STOCK BY PRUDENTIAL OIL & MINERALS COMPANY WAS ALSO EXEMPT AS AN ISSUANCE TO A CORPORATION.

As a result of the Findings of Fact and Conclusions of Law made by the Court subsequent to the dismissal of the second cause of action involving the alleged illegal issuance of stock, it would appear that a second exemption is available to the Respondents to cover the issuance of said stock by the company. The Court in its decision stated:

> "THE COURT FINDS that the Iowa corporation owned the 18 claims legally and equitably and that the plaintiff was a stockholder. Plaintiff gave no consideration for the Prudential stock, personally, although he took the stock in his own name.
>
> "Said stock apparently belonged to the Iowa corporation. The plaintiff, in this way, acquired the 40,000 shares of Prudential stock that belonged to the Iowa corporation. Plaintiff was not a party personally to the contract of exchange, and produced no evidence of being authorized to take title in himself for the stock."

Based upon such factual determination, it would appear that the Appellant held the stock as constructive trustee for the benefit of Empire Mining Company, and that in fact, the Empire Mining Company was the equitable owner of the stock. Section 61-1-6 of Utah Code Annotated enumerates exemptions from the law. Sub-paragraph 5 is as follows:

"The sale, transfer or delivery to any bank, savings institution, trust company or insurance company, *or to any corporation* or to any broker or dealer; provided that such broker or dealer is actually engaged in buying and selling securities as a business." (Emphasis added).

Since the issuance of the stock was in consideration of assets exchanged to Empire Mining Corporation and the stock "belonged to the Iowa corporation," it would appear that this issuance of stock was an issuance to a corporation and, therefore, is exempt under the foregoing section.

POINT IV

THE APPELLANT CANNOT QUALIFY UNDER THE STATUTORY CAUSE OF ACTION EVEN IF THE SALE WERE UNAUTHORIZED AND HIS APPEAL SHOULD THEREFORE BE DISMISSED.

Subsequent to the Trial Court dismissing the second cause of action on the basis that the issuance of the stock was exempt, as discussed above, another division of the Trial Court litigated certain factual issues which would show that the Appellant could not qualify under the statutory cause of action set forth in the second cause of action even if it had not been dismissed.

In order to better understand the issues litigated by the Trial Court and upon which Findings of Fact were made, it is necessary to review briefly the nature in which this action was commenced. Initially the suit was brought by W. D. Johnson as Trustee for the stockholders of Empire Mining Company. Empire Mining Company was alleged to be the owner of the claims which were issued to Prudential Oil & Minerals in exchange for stock. Thereafter a proposed amend-

ment to the pleadings was filed by the Appellant, wherein he sought to bring the action "individually and as assignee of Empire Mining Corporation." In the pleadings it was alleged that the title of the company to the claims had been assigned to the Appellant. A first amended complaint was then filed in the name of the Appellant and the pleadings alleged that the properties were jointly owned by the Appellant and the Empire Mining Company. A second amended complaint was then filed in which the Appellant appeared as a party and Empire Mining Corporation. Finally a third amended complaint was filed in the individual name of the Appellant, wherein he alleged he was the owner of the 18 mining claims. At all points in the pleadings the real party in issue was raised by the Respondents. After three pre-trial hearings and pre-trial orders, the issue of whether the Appellant was the real party in interest and had any substantial interest, or title to the mining claims was tried before the Court. An extended trial was had and a considerable number of documents were introduced in evidence, as well as considerable oral testimony.

After the extended trial and considerable argument by counsel for the respective parties, the Trial Court rendered a decision dated and filed May 27, 1960, which is part of the Supplemental Record on Appeal. The Court in its own memorandum decision made the following statements:

> "The plaintiff testified that title to the 18 claims was in the Iowa corporation until the exchange with Prudential. He also testified that he was the Iowa corporation, and that the Iowa corporation only held the stock for the plaintiff's benefit.
>
> "THE COURT FINDS that the Iowa corporation owned the 18 claims legally and equitably and that the

plaintiff was a stockholder. Plaintiff gave no consideration for the Prudential stock, personally, although he took the stock in his own name.

"Said stock apparently belonged to the Iowa corporation. The plaintiff, in this way, acquired the 40,000 shares of Prudential stock that belonged to the Iowa corporation. Plaintiff was not a party personally to the contract of exchange, and produced no evidence of being authorized to take title in himself for the stock.

"The plaintiff testified, in effect, that he put the title to the claims in the Iowa corporation to make it difficult for Grube-Harman Mining Company to press their claims, and also for the reason that there might be some need to probate his estate, if he died with the claims in his name.

"The Iowa corporation issued its stock for said claims. It appears that the Iowa corporation was not set up as a Trustee in any respect, but was being held out to the world as the owner, legally and equitably, of said 18 claims."

* * *

"THE COURT FINDS that the plaintiff had no interest in the Iowa corporate assets, except that of a stockholder, and that the Iowa corporation had both legal and equitable title to the 18 claims."

* * *

"THE COURT FINDS that the plaintiff is not the real party in interest. The case is dismissed with prejudice on the findings that the Plaintiff has no cause for action. The Court does not determine who does have a cause for action."

Thereafter proposed Findings of Fact and Conclusions of Law were prepared and objections were raised thereto. An amended set of Findings were then prepared, and again objec-

tions were made and argument was had in each case. Finally the third set of Findings of Fact and Conclusions of Law were signed by the Court, but even then objection was made by the Appellant and after further argument, one paragraph of these Findings was deleted. In essence the Court finally found that the Empire Mining Company held the title to the property, and was either a valid corporation or a de facto corporation, but in any event the Appellant was estopped to challenge the validity of the corporate existence of Empire Mining Company. The Appellant on the other hand was just a stockholder of Empire Mining Company, which owned legal title to the 18 mining claims, and which company conveyed the claims in exchange for stock of Prudential Oil & Minerals Co. The Court's Conclusions of Law in part is as follows:

> "5. The plaintiff is not the real party in interest of the first cause of action in the above-entitled law suit since he did not individually own said 18 mining claims, and if any fraud were perpetrated it was not against *the plaintiff causing him to depart with any valuable consideration to his detriment.*" (Emphasis added). (See Supplemental Record on Appeal.)

The second cause of action is a statutory cause of action predicated upon Section 61-1-25, Utah Code Annotated, which in part provides as follows:

> "Sales in violation of chapter—Remedies—Liability —Limitation of action—Every sale or contract for sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser, and the person making such sale or contract for sale and every director, officer or agent, for such seller who shall have participated or aided in any way in making such sale shall, upon tender to the seller of

the securities sold or of the contract made, *be jointly and severally liable to such purchaser for the full amount paid by him.* (Emphasis added.)

Assuming for the sake of this argument that there was a violation of the law and that the officers of Prudential are jointly and severally liable, it is submitted that their liability is *"to such purchaser for the full amount paid by him."* In this instance, in view of the Findings made by the Trial Court, it is obvious that this Appellant paid no consideration for the stock, and, therefore, he has not been damaged and the issues raised on the Appeal are moot questions.

1 AM. JUR. 424, Actions, Section 31, provides in part as follows:

> "Wrong Without Damage.—As a necessary corollary of the rule that wrong and damage must concur, it is a maxim of the law that wrong without damage, or injura absque damno, does not constitute a good cause of action, as the law furnished a remedy only for such wrongful acts as result in injury."

67 C.J.S. 899, Parties, Section 6, provides in part as follows:

> "Rights may not be enforceable except in the name of the injured party, so that one who sues in his own name must ordinarily show an injury to himself."
>
> "One without pecuniary loss has no judicial standing in the courts." Norah vs. Crawford, La. 49 So. 2d 751.

Since the Appellant has not appealed from the Findings of the Trial Court that he did not depart with any valuable consideration to his detriment, such a finding is res judicata and binding on the Appellant. The Utah Supreme Court in Mathews vs. Mathews, 1942, 132, P.2d 111, 114, stated:

> "The foundation principle upon which the doctrine of res judicata rests is that parties ought not to be permitted to litigate the same issue more than once; that, when a right or fact has been judicially tried and determined by a court of competent jurisdiction, or an opportunity for such trial has been given, the judgment of the court so long as it remains unreversed, should be conclusive upon the parties."

Since the Appellant has no pecuniary interest and that issue has been finally determined against him, and since by the very wording of the statutory cause of action which he attempts to assert, his only recovery would be for consideration paid by him, it is respectfully submitted that the appeal should be dismissed.

CONCLUSION

The Trial Court has held that the issuance of the stock was an exempt transaction since it was an isolated transaction within the meaning of the Securities Law. The statutory construction, Attorney General's opinions, and the practical accepted interpretation placed on the law by the Securities Commission and the Attorneys of the State warrant the affirming of such a holding. There is an additional exemption in that the stock was in essence issued to a corporation. Even, however, if there was a violation of the law the Appellant cannot comply with the cause of action created by the statute. Therefore, the Court should either rule that the sale was exempt, or dismiss the appeal.

Respectfully submitted,

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GORDON I. HYDE
Attorneys for Defendants and Respondents

APPENDIX

THE STATE OF UTAH
Office of the Attorney General
Salt Lake City, Utah
May 15, 1942

Grover A. Giles
Attorney-General
S. D. Huffaker
Deputy Attorney General

A. John Brennan
Zar E. Hayes
A. U. Miner
Calvin L. Rampton
Herbert F. Smart
Assistants

Department of Business Regulation
Securities Commission
BUILDING

Attention Lawrence Taylor, Director

Gentlemen:

By your letter May 6, 1942, you have requested the opinion of this office in interpretation of the provisions of Section 81-1-6(3), Revised Statutes of Utah, 1933, pertaining to exemption of securities from registration when sold in isolated transactions. The subject section is worded as follows:

> "An isolated transaction in which any security is sold, offered for sale, subscription or delivery by the owner thereof, or by his representative for the owner's account; such sale or offer for sale, subscriptions or delivery not being made in the course of repeated and successive transactions of a like character by such owner or on his account by such representative, and such owner or representative not being the underwriter of such security. The provisions of this subdivision shall not apply in any case of sale where the issuer shall have taken the entire stock of a company in payment for mining claims, patent rights, copyrights, trademarks, process, lease, formula, oil lease, good will or

any other property right or any other tangible or intangible asset which may be construed as a promotion interest, or where funds received from the sale of such security may be used directly for development purposes."

At the outset, it may be pertinent to note that not only does the section refer to isolated transactions, but also further qualifies the exemption by providing that such sales shall not be made in the course of repeated and successive transactions of a like character. This phraseology may, in some instances, be questioned from the consideration of vagueness. However, when applied to particular facts and circumstances, the portent or its meaning resolves itself into more definite form and the ordinary issuer or dealer can understand therefrom what he is permitted to do and what he is forbidden to do.

In the case of Kneeland vs. Emerton, 280 Mass. 371, 183 N.E. 155, the Court made these very interesting comments:

" . . . Sales of securities manifestly constitute the 'transactions'. The words 'repeated and successive' are used by way of contrast to the word 'isolated' employed earlier in the same sentence. In such context an 'isolated' sale means one standing alone, disconnected from any other, and 'repeated and successive' mean transactions undertaken and performed one after the other. We think that two sales of securities, made one after the other within a period of such reasonable time as to indicate that one general purpose actuates the vendor, and that the sale promote the same aim and are not so detached and separated as to form no part of a single plan, would be 'repeated and successive transactions'. The term 'reasonable time', which is necessarily implied in that connection from the words

of the statute, has no fixed and unvarying definition, but it is a term well known to the common law and has a long history in judicial decision. Seaver v. Lincoln, 21 Pick. 267; Howe v. Taggart, 133 Mass. 284, 287; Campbell v. Shoriskey, 170 Mass. 63, 67, 48 N.E. 1070; Lydig v. Breman, 177 Mass. 212, 219, 53 N.H. 696; Plymouth Country Trust Co. v. Seanlan, 227 Mass. 71, 116 N.E. 468. Thus it is 'a well-settled common-law meaning, notwithstanding an element of degree in the definition as to which estimates might differ.' Cline v. Frink Dairy Co., 274 U.S. 459, 47 S. Ct. 681, 685, 71 L. Ed. 1146. It is not essential to the validity of the statute that it prescribe the exact period of time within which 'repeated and successive transactions' must occur because they must be within a reasonable time fixed by the common law in the light of all the circumstances. The phrase 'transactions of like character' in its context refers to 'sale of any security' mentioned earlier in the same sentence. The dominant factor is 'transactions', and not the particular security. But the transactions must be confined to sales of such securities as fall within the prohibition of section 5 and are not excluded from its operation by section 3(b) to (p) inclusive, or other provisions of said chapter 110A. The words 'like character' import resemblance in salient features and not identity in all particulars. Bliss v. Bliss, 221 Mass. 301, 109 N.E. 148, L.R.A. 1916A, 889. Thus construed, we think that section 3(a) is not open to the objection of vagueness on constitutional grounds . . . "

Following a consideration of the principles laid down by the Court, which are expressions of the general trend of authority, it is apparent that the question you have submitted in your letter as to whether the subject section "refers to *One*

sale only or if more than one sale," how much such sales could be classified as isolated — may not be positively answered; since it is evident that the number of the transactions is alone not controlling in all cases, for it is apparent that other factors may control such as the type of offer that is made by the *issuer,* the question of the number of units offered, the manner of offering and the relation of the *issuer* to the offerees. (Emphasis added).

The Federal Securities Act, as amended, now provides for an exemption of transactions by an issuer not involving any public offering, and, it is evident and apparent that it was the intention of the Legislature of this State, when referring to isolated transactions not being made in the course of repeated and successive transactions, to distinguish an isolated offer or sale from a public offer or sale. What could constitute a public offering is essentially a question of fact in which all surrounding circumstances are of moment. Of course, any attempt to dispose of a particular security must be considered as an offer, but if there are preliminary negotiations with a substantial number of persons or prospective purchasers in order to convince such persons of the value of the securities, then, undoubtedly, such a transaction when consummated is the termination of a public offering and could not be held to be an isolated sale. Likewise, if the offering is restricted to a particular group or class, if there is a large number of persons in the group or class, the offering may be made to a sufficient number of persons to constitute a public offering and not an isolated transaction.

In the opinion of the General Counsel of the Securities

and Exchange Commission, released January 24, 1935, it was held that if the size of the offering or the number of units involved is so small that there is very little chance of repeated and successive transactions then there would be little probability of a distribution of the securities to the public generally and such an offering may only terminate in an isolated transaction. In considering the manner of offering the security, if the issuer enters into a few transactions with particular persons, the few transactions may be placed in the realm of isolated transactions more definitely than in the situation where the issuer engages a dealer or other machinery for the sale and distribution of the securities rather than by direct negotiation. As indicated in the case of Black vs. Solano, 114 Cal. App. 170, 299 P. 843, the fact that the securities may be sold as a private sale is beside the point for it was held that it was the manner of offering and not the type of sale which would control; and, it was remarked in this opinion that the *proof of sales of like interest to other parties* under all the circumstances, would have warranted the court in drawing an inference that the offer was made to anyone interested in a chance to share in a promotional venture, and was controlling.

In the case of Ersted vs. Hobart Howry Company, 299 N.W. 66, the following precedent was established:

"Under statutory provision that Blue Sky Law shall apply to 'isolated sales' of securities by the issuer or owner thereof, such sales not being made in course of 'repeated and successive' sales of securities of issue by same issuer or owner, the words repeated and successive are used by way of contrast to 'isolated', and in such context an 'isolated' sale means one standing

alone, disconnected from any other, and 'isolated and successive sales' mean transactions undertaken and performed one after the other, and to sales of securities made one after the other within a period of such reasonable time as to indicate that one general purpose actuates the vendor and that such sales promote the same aim and are not so detached and separated as to form no part of a single plan, are repeated and successive sales."

Therefore, it is my opinion that the question presented may not be absolutely settled at this writing, but that the statute involved and the principles herein set forth may only serve to advise you of the various elements of particular transactions which may be considered by your Commission in the determination of whether or not a particular transaction or series of transactions is exempt from the provisions of the Act.

Yours very truly,

/s/ Grover A. Giles
Attorney General

AJB:bhl

UTAH SECURITIES COMMISSION
THE STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL
SALT LAKE CITY

December 23, 1946

Mr. Lawrence Taylor, Director
Securities Commission
Department of Business Regulation
BUILDING

Dear Mr. Taylor:

You have referred to this office for an opinion, information regarding a proposed issuance and sale of $500,000 in 5 per cent debentures by *Pacific States Cast Iron Pipe Company.* You desire to know whether or not it will be necessary for the company to register these securities before offering them for sale.

According to the information in the possession of this office $200,000 of these debentures will be issued on January 1, 1947, and additional sums up to the $500,000 will be issued from time to time thereafter. There will be no underwriter of the proposed debentures and no commission will be paid for the sale of the same. The entire issue is to be sold to the stockholdders and officers of the McWane Cast Iron Pipe Company in Birmingham, Alabama, of which company the Pacific State Cast Iron Pipe Company is a subsidiary. No offer of any kind will be made to the general public.

Section 82-1-6, Utah Code Annotated, 1943, provides in part as follows:

"Except as hereinafter expressly provided, the provisions of this chapter shall not apply to the sale of any security in any of the following cases:

> (3) An isolated transaction in which any security is sold, offered for sale, subscription or delivery by the owner thereof, or by his representative for the owner's account; such sale or offer for sale, subscription or delivery not being made in the course of repeated and

successive transactions of a like character by such owner or representative not being the underwriter of such security.

The provisions of this subdivision shall not apply in any case of sale where the issuer shall have taken the entire stock of a company in payment for mining claims, patent rights, copyrights, trade-marks, process, lease, formula, oil lease, good will or any other property right or any other tangible or intangible asset which may be construed as a promotion interest, or where funds received from the sale of such security may be used directly or indirectly for development purposes."

It is the opinion of this office that in order to be an isolated transaction it is not necessary that a transaction be the only one of its kind. In order to determine whether or not a particular transaction actually comes within this section, it is necessary to consider the entire scope of the Securities Act. This act was obviously made for the purpose of protecting the public against the public offering for sale of securities which do not offer a sound investment. The isolated transactions exception was included because the Legislature felt that where an offer was to be made only to a few individuals and not to the general public, such individuals would probably be in a better position than would the state to determine the backing of the particular security involved.

Such is obviously the case in the proposed sale of these debentures. They are to be offered for sale only to officers and stockholders of the parent company of the issuer. Such persons are obviously in a position where they know or should know the backing of such securities. In view of the fact that the offer is to be made only to these individuals and in view of the fact that there are to be but a limited number of sales,this office is of the opinion that this security need not be registered.

Very truly yours,
(Signed) Grover A. Giles
GROVER A. GILES
Attorney General

CLR:ki/sda